#215

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SUPERIOR COURT
BARNSTABLE, SS
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SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

BACR2004-117

215

COMMONWEALTH

V.

DANIEL PRUNTY

COMMONWEALTH'S OPPOSITION TO THE DEFENDANT'S M.R.C.P. 25 (b)(2) MOTION[1]

Now comes the Commonwealth through its District Attorney Michael D. O'Keefe and opposes the defendant's Mass. R. Crim. P. 25(b)(2) motion. Although a Mass. R. Crim. P. 25(b)(2) motion may be filed at any time for a first degree murder, relief is limited to cases where the verdict was against the manifest weight of the trial. *Commonwealth v. Preston,* 393 Mass. 318 (1984). The Supreme Judicial Court has previously reviewed the record of this case, and declined to apply G.L. c. 269, §33E review. *Commonwealth v. Prunty,* 462 Mass. 295 (2012).

The defendant in this case has moved for a new trial pursuant to Mass. R. Crim. P. 30(b) in a previous filing, and

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[1] Please note that the Commonwealth filed a 300 page supplemental appendix with the opposition for the motion for a new trial. The Commonwealth is relying on the same exhibits in this case. Due to the sheer volume of paper, the Commonwealth is not re-filing the exhibits with this Rule 25(b)(2) motion, unless the Court requests otherwise. Due to the integral nature of the Supreme Judicial Court opinion, a copy has been attached to the Commonwealth's Opposition.

sought 25(b)(2) relief in the most immediate filing. These two post-conviction new trial rules are not one and the same. A Rule 25(b)(2) motion is intended to address situations where the verdict was against the manifest weight of the trial evidence. Rule 30(b) motions are for post-conviction relief after the verdict of guilt.

The defendant raises the exact same claims in this immediate motion as the previously filed Mass. R. Crim. P. 30(b) motion. For the reasons argued below, the defendant's immediate motion is of the Mass. R. Crim. P. 30(b) variety, based on substance.

STATEMENT OF THE CASE

1. The defendant, Daniel Prunty, was indicted by a Barnstable County Grand Jury on August 31, 2004 for one count of "Murder," G.L. c. 265, §1, one count of "Assault and Battery with a Dangerous Weapon," G.L. c. 265, §15A(b); "Extortion by Threat of Injury," G.L. c. 265, §25. (A/1-2)

2. The defendant was arraigned in Barnstable Superior Court, and he entered a plea of not guilty on September 7, 2004. (A/3)

3. The defendant's attorney, Robert Galibois, II, Esq., filed a motion to withdraw and Stephen Neyman, Esq., entered an appearance on February 11, 2005. (A/5)

4. The defendant filed two motions, a motion for funds for an investigator, and a motion for funds to hire a criminalist, on March 7, 2005. (A/5)

5. On November 11, 2005, the defendant filed funds for a firearms expert, which was allowed and not to exceed $5,000. (A/5; C/1-2)

6. The defendant filed a motion for funds for a polygraph examiner, which was allowed and not to exceed $3,500. (A/6)

7. The defendant filed a motion for funds for investigative services, on December 16, 2005. (A/6, C/3)

8. The defendant made an oral motion for funds of $5,000 for a fingerprint expert, which was allowed on January 6, 2006. (A/6)

9. The Court allowed the Commonwealth's motion for reciprocal discovery on February 3, 2006, and ordered the defendant to provide a short statement of the expert witness's opinion, "as required for an expert in a civil case." (A/8, O/1)

10. The defendant's trial began in Barnstable Superior Court before Nickerson, J., and a jury, on February 7, 2006. (A/9)

11. The defendant filed a motion for investigative services on February 7, 2006, after opening arguments and the beginning of the trial. (A/9)

12. The Commonwealth rested on February 13, 2006. The defendant filed a motion for a required finding of not guilty, which was denied on February 13, 2006. (A/10)

13. The defendant's motion for a required finding of not guilty was denied on February 13, 2006. (A/11)

14. The defendant rested his case on February 13, 2006. (A/11)

15. The defendant's renewed motion for a required finding of not guilty was denied on February 13, 2006. (A/11)

16. On February 14, 2006, the Court ruled on the motion for funds for investigative services filed on February 7, 2006, holding that the defendant is to submit an affidavit of indigency and the last 6 months of canteen records. (A/11-12)

17. The jury began deliberating on February 14, 2006. (A/12)

18. The jury returned a verdict on February 15, 2006. The defendant was found guilty on count one, first degree murder, by deliberately premeditated malice aforethought, guilty on count two, assault and battery with a dangerous weapon, and guilty on count three, extortion by threat of injury. (A/12)

19. The defendant was sentenced on February 15, 2006, by Nickerson, J., to State Prison for the term of natural life without parole. On offense three, the defendant was sentenced to a term of not more than fifteen and not less than twelve years, to be served concurrently with offense one, and on offense two, to state prison to a term of not more than ten years and not less than seven years. (A/13)

20. The defendant filed a notice of appeal on March 8, 2006. (A/13)

21. On March 27, 2006. The defendant filed a motion for funds for investigative services, nunc pro tunc, to November 1, 2005. He also, on that same date, filed a motion for funds for a criminalist, nunc pro tunc, to August 1, 2005. (A/13)

22. The Court denied the defendant's motions for funds for a criminalist and an investigator, as he did not file an affidavit of indigency filed as requested by the Court, and also due to his spending habits reflecting his efforts to maintain a lifestyle of "relative comfort" despite his surroundings. (A/13)

23. Attorney Charles Rankin filed a notice of appearance on November 20, 2006. (A/13)

24. The defendant's appeal, SJC-09849, was heard by the full bench Supreme Judicial Court on December 9, 2011. (B/1)

25. The Barnstable Superior Court Clerk's Office received the rescript opinion on June 25, 2012, and the judgments were affirmed, in an opinion written by Lenk, J. (A/14)

26. The defendant filed a motion for a new trial on March 28, 2016. (A/14)

27. The defendant filed the immediate Mass. R. Crim. P. 25(b)(2) motion on June 13, 2017.

STATEMENT OF FACTS

In the afternoon hours of August 7, 2004, Daniel Prunty, while in his home, 6 Palomino Way, in Sandwich, pointed a gun to

the head of the victim, Jason Wells, and pulled the trigger, firing one round into the victim's head inflicting a lethal wound. (Tr.142, 144, 146, 151, 155, 207, 211, 282, 318, 333, 338, 373 - 377, 412-416)

The defendant and several other individuals, including the victim, were at the defendant's house using cocaine all night the evening prior to the shooting. (Tr. 326, 403-04)
Sometime during the day on August 7, 2004, the defendant accused the victim of stealing money, watches, and jewelry. (Tr. 328)

Several of the individuals who were at the house the evening before, left the defendant's house during the day of August 7, 2004. (Tr.328) One of the individuals, Rebecca Pape, received a telephone call from the defendant, which resulted in her return to the house with Christopher Rose, Mark Rosa, and Michaela Davenport. (Tr.327) Upon return to the house, a big fight ensued. (Tr.329)

Rebecca Pape, at the time, was a heroin addict. (Tr.401) The defendant would usually supply it or buy it for her. (Tr.402) Pape would clean the defendant's house and do odd jobs for him. (Tr.402) During the week leading up to August 6, 2004, Pape and the victim stole money and jewelry from the defendant. (Tr.403) The victim also had an apparent drug problem. (Tr.403)

The defendant and Pape both used heroin and cocaine on August 5, 2004. (Tr.404) At some point on August 7, 2004, Pape

left the defendant's house to pick up Chris Rose, an ex-boyfriend. (Tr.405) Michaela Davenport, Christopher Rose, Mark Rosa, and Rebecca Pape were in the car. (Tr.406)

The defendant, Wells, and Richard Ford used cocaine at the 6 Palomino Way house on August 7, 2004. (Tr.537, 542) It was at that time that the defendant called Rebecca Pape on a cellular phone. (Tr.406, 408, 543) Prunty told Pape, "[y]ou know, how you took my stuff. . . and I want all my stuff back." (Tr.543) Prunty was agitated as he was missing money and jewelry. (Tr.406) The group in Pape's car drove to Prunty's house. (Tr.407) Katie Finnegan, the victim's girlfriend, also went to the defendant's home with her young daughter and Wells in her car. (Tr.283)

When Pape arrived at the defendant's house, the victim and the defendant were arguing. (Tr.407) The argument lasted for some time. (Tr.407) Finnegan went outside, as the defendant, Richard Ford, and Wells were arguing upstairs. (Tr.285) Wells escorted Finnegan and her daughter to her car, and he told her to leave. (Tr.286) Pape's car was parked behind Finnegan, so she sat in her car, unable to leave for about half an hour with her daughter in the car. (Tr.286-287) Wells tried to leave, but the defendant followed him outside, and Wells went back in the house. (Tr.288) Pape came out of the house twice to talk to Finnegan. The second time, Pape said, "there's guns in the

house, get your daughter out of here, quick." (Tr.297) Pape moved her car so Finnegan could leave. (Tr.297) Finnegan then left and immediately called 911, reporting an argument at the defendant's house, and stated she was a neighbor. (Tr.297) One minute later, the victim called, and sounded nervous. (Tr.297) He asked Finnegan to pick him up. (Tr.299)

The victim went into the dining room and sat down, and the defendant went upstairs and retrieved a gun and returned to the first floor. (Tr.407-408) Prunty then put the gun to the head of the victim and cocked it. (Tr.412, 601) The magazine had bullets in it and Prunty then loaded the weapon. (Tr.601-03) The defendant said to the victim, "[i]f you don't get my stuff by sunrise, you'll never see another sunrise again." (Tr.412) The defendant showed the magazine to Wells. (Tr.601) There were projectiles inside the magazine. (Tr.601) The defendant jammed the magazine in the gun. (Tr.603) He put it to the head of Wells, and said "you're going to die." (Tr.603, 608)

Wells began to cry and Rose pushed the gun away from the victim's head and he began to console him. (Tr.412-13) Wells began to make phone calls to get the stolen items back. (Tr.414, 417) Rose told the defendant to "put that thing away." (Tr.600) Rose then walked to an area off of the kitchen. (Tr.611) Rose saw the defendant holding the gun with it pointed towards Wells, and then heard a shot. (Tr.611)

Pape also observed the shooting. There was still arguing going on, and Pape turned to come back up the hallway when she saw the defendant with the gun. (Tr.415) Prunty was pointing the gun at the victim's head. (Tr.415) The defendant said "fuck it" and shot the victim in the head. (Tr.415-17) The victim then fell to the kitchen floor. (Tr.416)

Richard Ford was in the basement while the argument was happening. (Tr.554-56) Ford could hear arguing and the victim crying at one point. (Tr.555) Ford also heard Prunty say to the victim, "[y]ou're my friend. How could you do it? You stole from me." (Tr.555) The victim said to Prunty that he was sorry. (Tr.555-56) Prunty then said, "how could you steal my shit? I should kill you." (Tr.556) Five seconds later, Ford heard a gunshot and then a loud thud. (Tr.556-57) Ford went to the top of the stairs from the basement and saw the victim lying in the kitchen, and Prunty was standing right above him. (Tr.557-58) Ford saw blood behind the victim's head. (Tr.560) The defendant said, "oh my God, oh my God, what am I going to do?" (Tr.559) The defendant yelled to call 911. (Tr.599)(Ex.O)

Pape began to panic. (Tr.416) The defendant then said to Pape that he (Prunty) was in the bathroom with Pape and that Jason had killed himself. (Tr.416)

Pape and Rose could see a gunshot wound on the victim's forehead. (Tr.418-19, 611-12) Rose was yelling, "he blew his

head off. He blew his head off." (Tr.418) Rose grabbed the victim's face and said to hold on. (Tr.612) Rose testified that he never said "the kid shot himself." (Tr.612)

The defendant said "don't say anything" to Rose. (Tr.614) In fact, Rose committed perjury and said that he did not see anything at the grand jury. (Tr.614-615; J/1; M/1) He was scared that if he reiterated what he observed, "something would happen to [him]." (Tr. 614-615) Rose observed the defendant wipe the gun down with a t-shirt. (Tr.617)

Pape left the house. She ran to Finnegan's car and told her that "Jason shot himself." (Tr.304) Ford got in Finnegan's car, and they dropped her daughter off at her mother's house. (Tr.304) Finnegan and Ford returned to 6 Palomino Way. (Tr.304)

Pape was later interviewed by the police several times. Each time she indicated that the defendant was in the bathroom with her at the time of the shooting. (Tr.414-26) However, she admitted on direct examination that she lied to police. (Tr.424-25)

Pape also testified at trial that she and Prunty had spoken several times to get a story straight. (Tr.428; D/1) When asked why she was covering for Prunty, Pape stated, "cause Dan supplied me with everything I needed. He gave me money. He gave me drugs. He gave me cigarettes. He did everything for me. He bought me a leather coat, jewelry. And without him,

without me having him around, I had nothing. And I was going to be sick." (Tr.430-31)

Sandwich Police received two 911 calls within a short period of time on August 7, 2004. (Tr.134) The first 911 call by Finnegan indicated that there was a disturbance at 6 Palomino Way, Sandwich. (Tr.135) The second call was by the defendant, who stated that there was an accidental shooting, the victim shot himself. (Tr.138) The jury heard the 911 call by the defendant. (P/1)

Sandwich Police Officer D. Byrne and Sergeant J. Cotter arrived at the scene. (Tr.140) The defendant was one of the two men who met the officers outside of 6 Palomino Way. (Tr.140-41) Prunty told an officer that someone "shot himself." (Tr.141; O/1)

The police went into the house and identified the victim lying on the kitchen floor with a gunshot wound to his forehead. (Tr.142) Officer Byrne then checked the victim's vital signs. (Tr.142) Officer Byrne detected a pulse, then Sgt. Cotter went to retrieve emergency gear from one of the police cruisers. (Tr.142) Sgt. Cotter then observed a weapon behind Officer Byrne. (Tr.142) Byrne then secured the weapon, a Ruger .22 caliber rifle. (Tr.143-44) The gun was on the counter, pointing away from the victim. (Tr/144) There was no round in the chamber. (Tr.144) The safety was off and the gun was able to

be fired. (Tr.166) Rescue workers arrived and began working on the victim. (Tr.147-150) The victim was med-flighted to Boston. (Tr.335-36) When he arrived at a Boston area hospital, he was pronounced dead. (Tr.338)

Police continued to secure the house.[2] The defendant told Officer Byrne that the victim was a heroin addict. (Tr.151) The defendant told police that he brought the rifle downstairs just to threaten the victim in order to make him give his property back. (Tr.152) One spent shell casing was found in a pool of blood when the victim was removed from the house. (Tr.155) The defendant said the magazine was in his pocket the entire time, and he later placed it on the counter. (Tr.151) The defendant then told officers that he was taking to Rebecca Pape at the end of the hallway when the shot went off. (Tr.157-58) He never mentioned being in the bathroom. (Tr.167)

The defendant spoke with Sgt. Cotter. He told Cotter that the defendant must have shot himself. (Tr.207) Cotter asked the defendant what happened, and he stated that the victim took a bullet out of the "clip," put it in the gun, and shot himself. (Tr.211) He stated three times to Cotter that the defendant shot himself. (Tr.214)

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[2] A video of the scene was introduced at trial and played for the jury. (Tr.165)

The defendant also spoke with Sgt. Murphy of the Sandwich police. (Tr.226) He told Murphy that he was in an argument with Wells, and he grabbed his rifle as a means to threaten Wells. He stated that the gun was not loaded, it was an accidental shooting. (Tr.226) He did not mention "suicide" to Murphy. (Tr.226)

The defendant was escorted outside after speaking with police inside the house. (Tr.202) Officer Cavanaugh watched the defendant the entire time when he was outside. (Tr.202) The defendant was walking around the yard, speaking with the other individuals at the scene, and touching the crab grass. (Tr.203) Once the above information was conveyed to Sgt. Cotter, the defendant was placed under arrest and transported to Sandwich Police Department. (Tr.159)

Police executed a search warrant later that day at the defendant's house. (Tr.267) Drug paraphernalia was found in the upstairs master bedroom. (Tr.267) There was drug residue of a class A substance found on the items. (Tr.267) In addition, residue from a class C substance was also found on items recovered in the bedroom. (Tr.268) Police also seized a pair of blue jeans with a belt on them in the master bedroom bureau. (Tr.272)

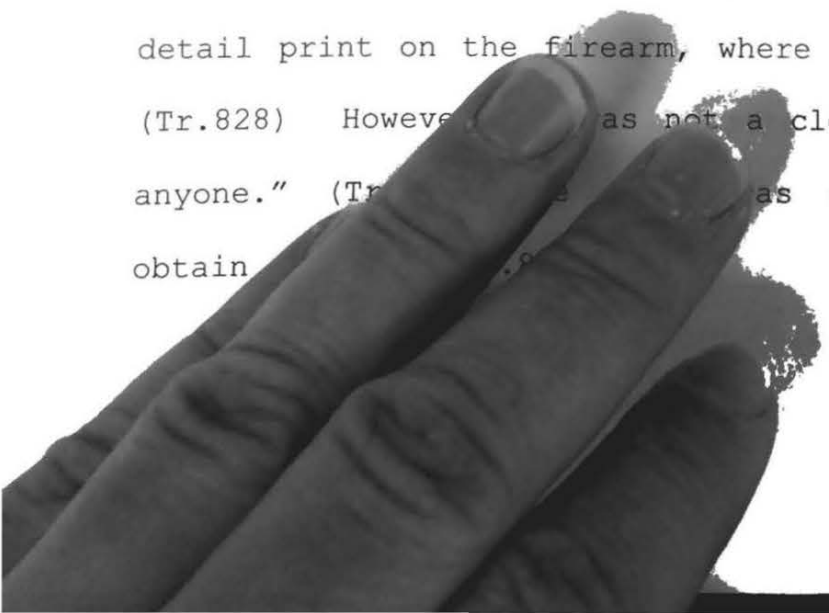
The defendant gave his clothing to Massachusetts State Police Sgt. Bill Burke at the Sandwich Police Department.

(Tr.528) The defendant gave Burke a pair of khaki shorts and a dress shirt. (Tr.529-530) The clothing was sent to the crime lab. (Tr.530) Burke also brought the pair of jeans and belt recovered from the master bedroom to the crime lab. (Tr.530-531)

Lt. Robert Ahonen of the Barnstable County Correctional Facility testified as to the three phone calls the Commonwealth introduced that were made by the defendant when he was incarcerated before his trial. (Tr.240) The defendant called Rebecca Pape twice on August 14, 2004. (Tr.245-249; D/1) The defendant also called his ex-wife, Rose Prunty, on August 15, 2004. (Tr.249; E/1)

Monte Gilardi, a state trooper and supervisor of the Crime Scene Services unit arrived at Palomino Way on the evening of the homicide. He observed a rifle on the kitchen counter. (Tr.820) There was blood spatter on the kitchen counter. There was a pool of blood in front of the counter. (Tr.820) A shell casing was found in the pool of blood. (Tr.820)

Gilardi dusted for fingerprints. He was able to get a ridge detail print on the firearm, where the barrel meets the stock. (Tr.828) Howeve as not a clear print, and it "could be anyone." (Tr as of insufficient quality to obtain .8



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Gilardi dusted for fingerprints. He was able to get a ridge detail print on the firearm, where the barrel meets the stock. (Tr.828) However, it was not a clear print, and it "could be anyone." (Tr.828) The print was of insufficient quality to obtain a match. (Tr.831)

Trooper Michael Arnold of the Massachusetts State Police testified as the Commonwealth's expert witness for ballistics/firearms. (Tr.735; F/1) Arnold had 30 years of experience at the time of trial. He attended armory schools held by Smith & Wesson, Stern Ruger, Sig Sauer, and Glock. (Tr.736) He has testified over 300 times. (Tr.736)

Arnold responded to the homicide scene the night that the victim was shot. (Tr.737) He observed the magazine and the gun on the counter. (Tr.738) He observed no rounds in the chamber and nine live rounds in the magazine. (Tr.738) The magazine was a standard Ruger rotary box. (Tr.738) The gun was a .22 long rifle caliber Ruger model 1022, semi-automatic rifle. (Tr.739) The gun was ready to fire, with an empty chamber, empty magazine, and the safety in the off position. (Tr.742)

Arnold test fired the weapon. There were nine rounds in the magazine, and he test fired two of them. (Tr.742) Arnold testified that the gun is operated by a box rotary system, and one shot is fired with each trigger pull. (Tr.743) The gun can hold ten live cartridges with the magazine inserted. (Tr.743) Arnold shot two cartridges from the nine that were in the magazine. Arnold examined the cartridges under a microscope and the individual markings matched. (Tr.745) The bullet that was recovered from the victim was unable to be matched as it fragmented inside Wells' head. (Tr.746)

Arnold also tested the weight of the trigger pull. It was five and one half to six pounds. (Tr.747) This is a normal weight for this firearm. The firearm cannot be described as a "hair trigger," which is one pound or less of pressure for it to fire. (Tr.748) Arnold also conducted a shock test, which is when a hammer is struck on the firing mechanism. (Tr.748) The gun passed the shock test, meaning, it did not fire when struck. (Tr.748)

Arnold also conducted a pattern test. (Tr.749) The pattern test is when the gun is fired at different ranges into a piece of cotton fabric and the stippling from the gunshot residue is measured. (Tr.749) Arnold measured a 3/4 inch pattern of gunshot stippling when the gun was two inches away from the target. (Tr.751) The medical examiner testified that the victim had a 3/4 inch pattern of stippling on his forehead with the gunshot wound. (Tr.751)

Arnold also tested the velocity of the firearm. (Tr.754-55) He stated further that he manually loaded the firearm, however, "it was not an easy thing to do." (Tr.757) Arnold testified that he would not expect gunshot residue to be on the hands of the shooter in this case, after firing one round. (Tr.758) He was not tested for gunshot residue ("GSR"). (Tr.759)

Kerri Donovan, a chemist with the Massachusetts State Police Crime lab tested the defendant's socks, belt, shorts, and sneakers for blood. (Tr.767) Donovan also tested a t-shirt belonging to Chris Rose. (Tr.768) All items were found to be negative for the presence of blood. (Tr.768)

Melissa O'Meara, a forensic chemist at the Massachusetts State Police Crime Laboratory processed the swabs taken from the defendant and Rose for gunshot residue. (Tr.787) The tests came back negative. (Tr.787) She stated that if someone washed their hands, or touched crab grass, it would be "unlikely" that there would be particles present. (Tr.789)

Sherri Menendez of the Massachusetts State Police crime laboratory arrived at 6 Palomino Way on the evening of the homicide. (Tr.770) She swabbed the defendant and the rifle for human blood. (Tr.770) The rifle came up negative for blood. (Tr.771) She swabbed the defendant's hands for blood, which came up positive. (Tr.773)

She tested the defendant's hands and Rose's hands for gunshot residue, which both came up negative. (Tr.773) Passage of time, washing hands, and wiping hands can all eliminate GSR from being found on an individual's hands. (Tr.775) She tested the defendant at 8:30 P.M. and Rose at 8:45 P.M. (Tr.773-775) The time limit for GSR testing is three hours according to the manufacturer of the GSR testing kit. (Tr.776) The state police

conduct the test after four hours because they have been able to detect GSR in that time frame, despite the three hour recommendation from the manufacturer. (Tr.774-775)

Menendez tested the defendant's hands for blood, which came up positive. (Tr.777) The defendant had a cut on his knuckle. (Tr.778) The kitchen and sink were also tested for blood, which came up positive. (Tr.779) The trash can did not contain any GSR. (Tr.779) A napkin in the trash can was positive for blood. (Tr.779)

An autopsy of the victim was done at the Massachusetts Medical Examiner's Office in Boston. (Tr.371-80) The medical examiner opined that the gun was inches from the victim's head when it was fired. (Tr.377) And the cause of death was determined to be a rifle gunshot wound to the head. (Tr.385) The medical examiner observed stippling or tattooing from the unburnt gunpowder, embedded in the victim's head. (Tr.372) the medical examiner indicated that this shows the gun was inches from the skin when fired. (Tr.377) The medical examiner also observed two skin tears on the forehead that were not from the gunshot. (Tr.384)

Lieutenant Christopher Mason of the Massachusetts State Police Detective's Unit Assigned to the Cape and Islands District Attorney's Office interviewed Prunty on August 8, 2004 at the Sandwich Police Department. (Tr.899-900) The defendant

wanted to speak with police again. (Tr.900) The defendant waived his Miranda rights. (Tr.841) The defendant indicated that on the morning of the shooting, Wells and one of his friends came over at 11 A.M. (Tr.908) The pair wanted to use cocaine, and the defendant told them no. (Tr.908)

The defendant noticed a Rolex watch missing at his house. (Tr.909) Wells blamed Pape, and she denied involvement. (Tr.909) Pape showed up at the house, and she became very upset. (Tr.909) She chased Wells around with a knife. (Tr.910)

The defendant went upstairs, got a gun from a closet, and brought it downstairs. (Tr.912) He placed the magazine in his pants pocket. (Tr.914) The gun was unloaded. (Tr.912) He placed the gun to the head of Wells. (Tr.915) He told Wells that if he did not return his items, he would never see another sunrise. (Tr.915)

Wells made phone calls to get the items back. (Tr.917) The defendant followed Pape to the end of the hall to give her a hug and apologize. (Tr.918) He then heard a gunshot about 10 to 15 seconds after walking down the hallway. (Tr.919) He observed Rose wiping the gun down. (Tr.922) The defendant called 911 indicating it was an accidental shooting. (Tr.925)

The defendant stated he never placed the magazine in the rifle. (Tr.925) He indicated that the victim must have committed suicide. (Tr.927) Mason stated this was an

implausible theory, based on the autopsy results and the findings at the scene. (Tr.927) The defendant then said that Rose must be responsible. (Tr.927) He stated that Rose must have pulled the trigger. (Tr.928) Mason asked how this was possible, considering the gun was unloaded. (Tr.928) The defendant stated he put the magazine on the table, and it is possible a projectile fell onto the floor, which Rose placed in the gun. (Tr.928)

Mason indicated that for this to be plausible, Rose must have found the round on the floor, retrieved it, moved the slide back, loaded the gun from the top, disarmed the safety, and pulled the trigger all in the span of 10 to 15 seconds. (Tr.929)[3] The defendant said that it was more like 15 to 30 seconds that he was in the hallway talking to Pape. (Tr.929)

Mason also asked if the defendant was wearing khakis and a white shirt, because witnesses said he was wearing jeans and no shirt. (Tr.931) The defendant said the witnesses were incorrect or lying. (Tr.931) The defendant also said that Pape lied when she said the defendant was not in the bathroom with her. (Tr.932) The defendant further indicated that Rose shot the victim to "impress" Pape. (Tr.932) the defendant said to test his hands and clothes for forensic evidence. (Tr.935)

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[3] Rose testified at trial that he had no experience with guns, he was not a hunter, did not go target shooting, or in the military. (Tr.601)

Thomas Salamone met the defendant when he was in the protective custody section of the old jail in Barnstable. (Tr.841) Salamone stated that the defendant was "always talking about his case, over and over again." (Tr.842) He talked about his case with Salamone approximately 25 to 50 times. (Tr.842) The defendant told Salamone that he told Rebecca Pape to say he was in the bathroom at the time of the shooting. (Tr.842) The defendant told Salamone he threatened Wells by saying "if you don't get my stuff back before sunrise, you'll never see another sunrise." (Tr.844) The defendant told Salamone that he said to Pape to make sure she told the cops he was in the bathroom with her. (Tr.846) The defendant told Salamone that he "pulled the trigger" one day when they were walking in the recreation area. (Tr.864-867)

The defendant was interviewed by Trooper John Kotfila of the Massachusetts State Police on the evening of the shooting, August 7, 2004, at 7:00 P.M. at the Sandwich Police Department. (Tr.710-711) The defendant denied shooting the victim, but relayed the story regarding the theft of his items by the victim. (Tr.711-15) Prunty indicated that Wells and Pape stole jewelry and money from him. (Tr.715) He gave Wells until the next day to return the items. (Tr.715) Prunty became mad and went upstairs and got a gun from the closet, and put the magazine in his pocket. (Tr.717) He was apologizing to Pape in

the hallway, and walking to the garage, when he heard a gunshot. (Tr.718) Wells was shot in the head in the kitchen, with blood everywhere. When the defendant was confronted with inconsistencies of the story he told the initial responding officers and Kotfila, the defendant admitted to pointing the gun at the victim's head. (Tr.721) The defendant told Kotfila that: "This n****r came up from Hyannis and ripped me off," he "wanted to crack the guy upside the head," and "I'm not some chump you can rip off." (Tr.711-722) Wells was alone when he was shot. (Tr.720) The defendant indicated he did not know where the bullet in the gun came from, since he told Kotfila the gun he brought downstairs was unloaded. (Tr.720) He said that the gun came from his neighbor, Mr. O'Connor. (Tr.721) He left the gun at the defendant's house after a disagreement, and the pair had not spoken since that date. (Tr.721)

Prunty was presented with the contradictions in his story. (Tr.721) The defendant stated, "I'm not some chump you can rip off," and he "wanted to crack the guy upside the head." (Tr.721) The defendant admitted to pointing the gun at Wells' head. (Tr.721) The defendant saw Rose wipe the gun off with his t-shirt after the shooting. (Tr.723)

The Defendant's Case

Joey Fagone, an inmate at the Plymouth County House of Correction, testified for the defendant. (Tr.1012) He stated

that Rose told him that there is an inmate "doing time for something I did." (Tr.1012-1013) Fagone and the defendant were both housed at the Plymouth County House of Correction. (Tr.1014) Fagone discussed his testimony and Rose's statement with the defendant's lawyers. (Tr.1015)

Nancy Bonito, a Falmouth Police Officer, also testified as a witness for the defendant. She stated that she picked up a shirt from Rose, which he indicated he wore on the day of the shooting. (Tr.957) Rose spontaneously told her, without prompting, that he did not observe the shooting. (Tr.957) Fagone turned the shirt over to Sergeant Burke. (Tr.958)

Trooper Kimberly Squier testified as a defense witness. (Tr.968) She stated that Pape told her on August 7 that she was with the defendant when the gun went off. (Tr.972) Pape then told Squier on August 8 that she was in the bathroom alone when the gun went off, as she had some time to think about it and realized she was alone. (Tr.972) Pape told Squier the defendant was wearing blue jeans with a black belt and no shirt. (Tr.973)

ARGUMENT

I. THE DEFENDANT CANNOT SUCCEED ON THIS MOTION AS THE SUPREME JUDICIAL COURT HAS ALREADY REVIEWED THE CASE, AND FOUND THAT §33E RELIEF IS NOT WARRANTED AND THE VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE, AND THE EVIDENCE AT TRIAL WAS "OVERWHELMING."

The defendant has previously sought and received §33E review on his appeal in chief, *Commonwealth v. Daniel Prunty*,

462 Mass. 295 (2012). The Supreme Judicial Court declined to apply §33E review, instead stating, "[h]aving reviewed the entire record pursuant to our duty under G. L. c. 278, § 33E, we discern no reason to reduce the verdict of murder in the first degree or to require a new trial." *Prunty, supra* at 318.

As the Supreme Judicial Court has declined to reduce the murder verdict to a lesser degree of guilt under §33E, *Commonwealth v. Prunty,* supra, the defendant is essentially requesting the court apply the rule 25 (b)(2) standard for the second time. Review under Mass. R. Crim. P. 25(b)(2) is substantially similar to review under Mass. Gen. Laws ch. 278, § 33E. *See Commonwealth v. Randolph*, 438 Mass. 290 (2002)(holding that where the Supreme Judicial Court of Massachusetts has already refused to reduce a murder verdict to a lesser degree of guilt under § 33E, the court cannot fault a motion judge's failure to do so under Mass. R. Crim. P. 25(b)(2)) As the Supreme Judicial Court found that the evidence does not warrant a reduction in verdict, this Court must not find that a lesser verdict of guilty is necessary.

Pursuant to Mass. R. Crim. P. 25(b)(2), the trial court has the power to enter a finding of guilty of any lesser included offense, or in applying the language of §33E, a lesser degree of guilt after a verdict of guilty. This has the practical effect of extending to the trial courts, post-verdict, a power in all

cases much like that which is provided to the Supreme Judicial Court under §33E in capital cases under 278, §33E.

This Court, in applying 25(b)(2), should be guided by the same considerations used by the Supreme Judicial Court in its application of §33E. *See Commonwealth v. Gaulden,* 383 Mass. 543 (1981); *Commonwealth v. Maillet,* 400 Mass. 572 (1987); *Commonwealth v. Greaves,* 27 Mass. App. Ct. 923 (1999). The In deciding whether to reduce a jury verdict to a finding of guilty of a lesser offense, a trial judge, acting under rule 25 (b)(2), is guided by the same considerations that guide the Supreme Judicial Court in the exercise of its powers and duties under § 33E to reduce a verdict. The Supreme Judicial Court has used that power sparingly. The court's function has not been to second-guess the jury. *See Commonwealth v. Earltop,* 372 Mass. 199, 204 (1977). WhThe Court is to review the record to determine if, in this case, "[the defendant's] criminal involvement was not of the nature that judges and juries, in weighing evidence, ordinarily equate with murder in the first degree." *Commonwealth v. Williams,* 364 Mass. 145, 151-152 [1973]).

As the Supreme Judicial Court declined to find that §33E is applicable, here then, 25(b)(2) review should not result in a lesser verdict of guilt and the conviction must stand.

II. THE COURT APPLIES THE 25(B)(2) STANDARD BY VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH, PURSUANT TO *COMMONWEALTH V. LATIMORE*, AND THEREFORE, THE DEFENDANT IS UNABLE TO SUCCEED.

The defendant's immediate motion, filed under 25(B)(2), raises the same issues as his Rule 30 Motion for a New Trial. The motions are almost carbon copies of each other. The substance of this motion establishes that it is a Rule 30 motion for a new trial and not a Rule 25 motion. Pleadings are to be treated according to nature and substance rather than technical form. *See Commonwealth v. Pring-Wilson,* 448 Mass. 718 (2007); *Commonwealth v. Preston,* 393 Mass. 318, 322-324 (1984); and *Commonwealth v. Cornish,* 28 Mass. App. Ct. 173, 178-179 (1989).

A Rule 25(b)(2) motion is intended to address situations where the verdict was against the manifest weight of the trial evidence. A Rule 30 motion for a new trial encompasses post-conviction relief after the verdict of guilty. Rule 25 motions are based on the trial evidence, and trial evidence only. The defendant has attached affidavits from himself, witnesses, and also an expert in the area of ballistics. This extraneous information, garnered 11 years after the homicide, should be struck and not considered. Rule 25(b)(2) motions are confined to the trial record. In reviewing the propriety of the denial of a motion for required finding of not guilty, the court examines the record to determine whether evidence, read in light

most favorable to Commonwealth, was sufficient to satisfy rational trier of fact of each element of crime beyond reasonable doubt. *Commonwealth v. Cinelli* 389 Mass. 197 (1983), cert. denied, 464 U.S. 860 (1984). The standard for measuring the correctness of judge's denial of motion for required finding of not guilty is whether, considering the evidence in the light most favorable to the Commonwealth, a jury of ordinary intelligence would be satisfied of guilt beyond reasonable doubt. *Commonwealth v. Salim*, 399 Mass. 227 (1987). The court is clearly confined to the trial record- it is whether the evidence supported the finding of guilty, and the defendant should not be permitted to introduce extraneous information.

This situation is comparable to *Commonwealth v. Cornish*, 28 Mass. App. Ct. 173, 178-179 (1989), where the Court treated a rule 25(b)(2) motion as a rule 30(b) motion, where the judge was concerned about trustworthiness of evidence, fairness, and interests of justice rather than about verdicts being against weight of evidence. The same issues are argued in the defendant's immediate motion: trustworthiness of ballistics evidence, fairness and trustworthiness of witness testimony, and interests of justice as far as ineffective assistance of counsel allegations. The defendant's motion should be treated as a Rule 30 motion for a new trial.

III. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH, THE EVIDENCE WAS SUFFICIENT BEYOND A REASONABLE DOUBT TO ESTABLISH THAT THE DEFENDANT COMMITTED THE OFFENSE OF MURDER PURSUANT TO THE THEORY OF DELIBERATE PREMEDITATION.

A. The trial evidence supports a finding of guilt for first degree murder by deliberate premeditation.

The Supreme Judicial Court properly held that the defendant's conviction for first degree murder under the theory of deliberate premeditation was appropriate and did not reduce the verdict to a lesser degree of murder. The defendant argues that he is entitled to be found either 1) not guilty; or 2) have his verdict reduced to involuntary manslaughter.

The facts underlying the defendant's case support a conviction of first degree murder, as found by the Supreme Judicial Court. The Court declined to exercise its authority under §33E to vacate the conviction, or issue a lesser degree of murder. Moreover, the Court described the evidence against the defendant as "overwhelming." (B/15)

The jury was instructed on not only first degree murder, but also second degree murder, voluntary manslaughter, and involuntary manslaughter. (Tr.1153, 1157, 1166) The jury rejected all of the theories of culpability and found the defendant guilty of first degree murder.

The defendant argues that there was no "deliberate premeditation" in this case, and it was an accidental shooting. Viewing the evidence in the light most favorable to the

Commonwealth, any rational jury could have found deliberate premeditation beyond a reasonable doubt. *Commonwealth v. Latimore,* 378 Mass. 671, 677-678 (1979). Deliberate premeditation means that "the defendant's decision to kill was the product of 'cool reflection.'" *Commonwealth v. Davis,* 403 Mass. 575, 582 (1988). "[N]o particular period of reflection is required, and . . . a plan to murder may be formed in seconds." *Commonwealth v. Coleman,* 434 Mass. 165, 168 (2001).

In order to prove the offense of murder under the theory of deliberate premeditation, the Commonwealth must establish that the defendant reflected on his resolution to kill. *Commonwealth v. Dalton,* 385 Mass. 190, 196 (1982); *Commonwealth v. Soares,* 377 Mass. 461, 469, cert. denied, 444 U.S. 881 (1979). "Where the purpose is resolved upon and the mind determined to do it before the blow is struck, then it is, within the meaning of the law, deliberately premeditated malice aforethought." *Commonwealth v. Blaikie, 375* Mass. 601, 605 (1978), quoting *Commonwealth v. Tucker,* 189 Mass. 457, 494 (1905).

The Supreme Judicial Court has consistently stated that, where a defendant brings a gun to the scene of the crime, there is sufficient evidence to support an inference of premeditation. *Commonwealth v. Stewart,* 398 Mass. 535, 541 (1986); *Commonwealth v. Lattimore,* 396 Mass. 446, 453 (1985), S.C., 400 Mass. 1001 (1987).

In the present case, the jury was warranted in finding that the defendant committed the offense of murder in the first degree pursuant to the theory of deliberate premeditation. The facts, as summarized by the Supreme Judicial Court, state that:

> "[a]t some point, the defendant confronted Wells about the missing items, and an argument ensued. Wells in turn accused Rebecca Pape, a friend of Wells who had also been at the defendant's home the night before. The defendant then telephoned Pape, telling her that he knew that she had taken his "stuff" and he wanted it back. Pape, with Christopher Rose and two other individuals, drove to the defendant's home, where the argument between the defendant and Wells was ongoing." Prunty, supra at 297.

The Court then describes the actual moments leading up to the homicide:

> When Wells went into the dining room and sat down, the defendant proceeded upstairs, retrieved his Ruger .22 caliber rifle, and returned to where Wells was sitting. The defendant pointed the rifle at Wells's head and cocked it, telling him, "If you don't get my stuff by sunrise, you'll never see another sunrise again." Rose intervened, pushing the rifle away and consoling Wells, who had started to cry. Wells admitted his role in taking the defendant's property and went into the kitchen to make telephone calls to retrieve the stolen items. When Wells could not reach anyone, the defendant again pointed the gun at his head. This time, the defendant fired into Wells's head.

The jury was warranted in finding that the defendant committed first degree murder under a theory of premeditation, as the defendant was arguing with the victim, went upstairs, retrieved a firearm, threatened him, and then shot him when the

victim could not retrieve the stolen items. The fact that there was an argument, then a loaded firearm was obtained, and the defendant said that the victim was never going to see another sunrise again, establishes purposeful character of premeditated malice. *Compare Commonwealth v. Gomez*, 450 Mass. 704 (2008)(holding that evidence was sufficient to establish premeditation where the defendant argued with the victim, retrieved a gun, and went to the victim's apartment and shot the victim); *Commonwealth v. Watkins*, 373 Mass. 849 (1977)(holding that evidence was sufficient to establish premeditation where the defendant, after a quarrel, went to the kitchen, picked up a knife, and returned to stab the victim); *Commonwealth v. Lennon*, 463 Mass. 520 (2012)(holding that defendant was properly convicted of deliberate premeditated murder because there was no evidence that the defendant was debilitated, or that the victim provoked the defendant).

The term "deliberately" has reference to purposeful character of premeditated malice rather than to time spent in premeditation. *See Commonwealth v. Brooks*, 308 Mass. 367 (1941). Deliberate premeditation can occur within a few seconds. *Commonwealth v. Garabedian*, 399 Mass. 304 (1987). Where the defendant brings a gun to the scene of a crime, there is sufficient evidence to support evidence of premeditation. *Commonwealth v. Ruci*, 409 Mass. 94 (1991).

Here, the evidence was sufficient to establish deliberate premeditation, where the defendant was arguing with the victim, went upstairs to his closet and got the rifle, put the magazine in, chambered a round, held the gun up to the victim's head, backed off and said he would "never see another sunrise." The victim began to make phone calls, then the defendant shot him in the head at point-blank range after saying, "fuck it." *Compare Commonwealth v. Williams,* 422 Mass. 111, 123 (1996) ("use of a firearm in the killing is sufficient to support a verdict of murder in the first degree based on deliberately premeditated malice aforethought"); compare also *Commonwealth v. Coleman,* supra at 169 ("placement of the fatal wound, fired at close range into the victim's chest would also support a finding of deliberate premeditation"); Commonwealth v. Watkins, 373 Mass. 849, 852, (1977)(defendant's statement that he would "kill anyone who came in" room was evidence of deliberate premeditation).

The defendant compares the facts of this case to *Commonwealth v. Pichardo,* 45 Mass. App. ct. 296 (1998). In *Pichardo,* the defendant was entitled to a new trial where the court erroneously defined 'malice" in the jury instructions, which affected the distinction between manslaughter and second degree murder. The defendant shot the victim, who was sitting

in a car, then stated, "what the fuck, I thought the gun was empty." Id. at 298.

The facts of *Pichardo* are significantly different from the facts of the case at bar. Here, as outlined above, viewing the evidence in the light most favorable to the Commonwealth, there was sufficient evidence of malice. The defendant provided conflicting alibis, admitted to retrieving a gun from his bedroom, and admitted to threatening to kill the victim with the gun moments prior to the shooting. The defendant told an inmate he intended to shoot Wells The defendant changed his clothes immediately after shooting and provided a different pair to law enforcement, and changed his story multiple times, consistent with consciousness of guilt. The defendant tried to use Pape as an alibi. The evidence introduced at trial clearly supports evidence of malice, knowledge, and intent to kill Wells.

B. The evidence does not support a finding of involuntary manslaughter.

Involuntary manslaughter can be established by two alternate theories, "wanton and reckless conduct" and "unlawful killing unintentionally caused by a battery." Involuntary manslaughter is an unlawful killing unintentionally caused by wanton and reckless conduct; and it is also an unlawful killing unintentionally caused by a battery that the defendant knew or should have known created a high degree of likelihood that

substantial harm will result to another. To support a conviction of involuntary manslaughter, the Commonwealth must establish the *Welansky* standard for wanton or reckless conduct, i.e. when an "ordinary normal man under the same circumstances would have realized the gravity of the danger." *Commonwealth v. Welansky*, 316 Mass. 383, 398-399 (1944)[4].

Here, the facts of the defendant arguing with the victim, irate over the stolen items, going upstairs and leaving the scene to get a firearm, showing the loaded magazine to the victim, holding the barrel of the gun a few centimeters, at best, from the victim's head, stating that he would never see another sunrise again, and then saying "fuck it" and pulling the trigger do not establish "involuntary manslaughter." The facts are consonant with the verdict of first degree murder under the theory of deliberate premeditation.

Here, the Supreme Judicial Court properly held that the evidence was sufficient to establish first degree murder on a theory of deliberate premeditation. This Court should not reduce the verdict to involuntary manslaughter or enter a

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[4] When thinking of the classic "involuntary manslaughter" scenario, one is reminded of the first few lines of the classic English poem, "A Father's Advice," by Mark Hanbury Beaufoy, written in 1902. "Never never let your gun, pointed be at anyone, that it should unloaded be, matters not the least to me." Here, facts are replete in this case of the defendant's purposefulness in shooting Mr. Wells point-blank in the head, contrasting with the "accident" scenario.

verdict of not guilty. This Court should strike the affidavit from the ballistics expert as well as the additional witnesses, and strike the affidavit of the defendant, as it is information beyond the trial record, as discussed, infra.

IV. THE DEFENDANT IS NOT ENTITLED TO A FINDING OF NOT GUILTY OR INVOLUNTARY MANSLAUGHTER, AS THE SHOOTING WAS CLEARLY A FIRST DEGREE HOMICIDE BY DELIBERATE PREMEDITATION, NOT INVOLUNTARY MANSLAUGHTER.

The defendant asserts that the "forensic evidence in this case supports a verdict of not guilty because the shooting was an accident and without malice, or at best for the Commonwealth, a finding of involuntary manslaughter." (D.Mem.21-22)

The defendant makes much of the fact that police found the firearm unloaded with the safety on when they responded to the house. This is not fatal to the defendant's conviction, nor does it support an argument of innocence on appeal or warrant relief under 25(b)(2). The magazine was clearly removed from the firearm prior to the projectile being fired, or a projectile was removed from the firearm, along with the magazine removed, after the defendant shot the victim. The fact that a round was not in the chamber after the defendant shot the victim in the head does not support an argument of factual innocence. In fact, it supports the Commonwealth's trial theory: that the defendant took calculated steps to minimize his involvement and the forensic evidence in this case: wiping down the gun, encouraging

witnesses to commit perjury, changing his clothes, and wiping his hands on the lawn to remove gunshot residue.

Trooper Michael Arnold of the Massachusetts State Police testified as the Commonwealth's expert witness for ballistics/firearms. (Tr.735; F/1) Arnold had 30 years of experience at the time of trial. He attended armory schools held by Smith & Wesson, Stern Ruger, Sig Sauer, and Glock. (Tr.736) He has testified over 300 times. (Tr.736) Arnold responded to the homicide scene the night that the victim was shot. (Tr.737) He observed the magazine and the gun on the counter. (Tr.738) He observed no rounds in the chamber and nine live rounds in the magazine. (Tr.738) The magazine was a standard Ruger rotary box. (Tr.738) The gun was a .22 long rifle caliber Ruger model 1022, semi-automatic rifle. (Tr.739) The gun was ready to fire, with an empty chamber, empty magazine, and the safety in the off position. (Tr.742)

Arnold test fired the weapon. There were nine rounds in the magazine, and he test fired two of them. (Tr.742) Arnold testified that the gun is operated by a box rotary system, and one shot is fired with each trigger pull. (Tr.743) The gun can hold ten live cartridges with the magazine inserted. (Tr.743) Arnold shot two cartridges from the nine that were in the magazine. Arnold examined the cartridges under a microscope and the individual markings matched. (Tr.745) The bullet that was

recovered from the victim was unable to be matched as it fragmented inside Wells' head. (Tr.746)

Arnold also tested the weight of the trigger pull. It was five and one half to six pounds. (Tr.747) This is a normal weight for this firearm. The firearm cannot be described as a "hair trigger," which is one pound or less of pressure for it to fire. (Tr.748) Arnold also conducted a shock test, which is when a hammer is struck on the firing mechanism. (Tr.748) The gun passed the shock test, meaning, it did not fire when struck. (Tr.748)

Arnold also conducted a pattern test. (Tr.749) The pattern test is when the gun is fired at different ranges into a piece of cotton fabric and the stippling from the gunshot residue is measured. (Tr.749) Arnold measured a 3/4 inch pattern of gunshot stippling when the gun was two inches away from the target. (Tr.751) The medical examiner testified that the victim had a 3/4 inch pattern of stippling on his forehead with the gunshot wound. (Tr.751)

Arnold also tested the velocity of the firearm. (Tr.754-55) He stated further that he manually loaded the firearm, however, "it was not an easy thing to do." (Tr.757) Arnold testified that he would not expect gunshot residue to be on the hands of the shooter in this case, after firing one round.

(Tr.758) He was not tested for gunshot residue ("GSR"). (Tr.759)

The jury heard that it was possible to load the firearm manually. (Tr.756) He also stated that the gun can fire without the magazine inserted. (Tr.764) Arnold stated that he was not tested for GSR after test-firing the weapon. (Tr.759) Arnold could not say to any degree of scientific certainty if GSR would be on a shooter's hands after firing the gun. (Tr.759) He stated further that if you wipe the gun down, you would find gunshot residue on the object used to clean it. (Tr.761) In closing argument, trial counsel stressed that the defendant's clothes were not tested for gunshot residue, and that Arnold test fired the gun yet did not test himself for gunshot residue. Trial counsel also argued that the cartridge exits to the right, however it was found to the left of Wells, which is inconsistent with where the defendant was purported to have been standing. (Tr.1085-1088)

Lastly, the transcript reflects that trial counsel did request an instruction on involuntary manslaughter for the specific reasons in the defendant's memorandum- that the defendant placed the magazine in the chamber, cocked the gun, removed the magazine, and shot the victim without being aware that there was a round in the chamber. (Tr. 1034-1035)

Trial counsel argued in his closing that the shooting was accidental- albeit by Rose, however, defense counsel asserted it was an accidental shooting. (Tr.1088) Moreover, trial counsel stated in his closing, "[n]ow what does that tell you? That tells you that when Mr. Prunty originally threatened Mr. Wells with the gun and put the magazine in and manipulated the action, a gun - excuse me, a live round enters the chamber." (Tr.1087) The jury was instructed by the court that the Commonwealth had to prove beyond a reasonable doubt that the "killing was not the result of an accident." (Tr.1154)

As this theory was explored at trial, the evidence clearly is consonant with the verdict of guilty on first degree murder.

V. THE PROSECUTOR DID NOT PREVENT PAPE FROM GIVING EXCULPATORY TESTIMONY BY THREATENING HER WITH PERJURY AND JAIL, WHEN THE WITNESS CLEARLY LIED AT THE GRAND JURY.

The defendant states that the prosecutor committed prosecutorial misconduct by allegedly threatening Pape to testify. This claim, as indicated in Issue II, supra, is not a 25(b)(2) claim, it is a Rule 30 claim. It relies on material outside the trial record- grand jury testimony, affidavits, and interviews. The Commonwealth has reiterated the same argument below that it set forward in its Rule 30 opposition.

The defendant alleges that the prosecutor prevented Pape from providing exculpatory testimony, and he bases this claim on two documents: 1) a transcript of an interview of Pape conducted

by the defendant's private investigator; and 2) the affidavit of Brian Illife, an inmate. Neither of these sources are credible, and they are outside the record and addressed in the Commonwealth's motion to strike.

The has obtained an affidavit from Brian Illife, who is currently incarcerated, who reiterates what Pape allegedly told him in a sheriff's transport van 12 years ago. Illife's affidavit is essentially "double hearsay," and lacks any shred of credibility. Illife was not a witness who testified at trial.

Pape testified at trial in contradiction to Illife's statement, saying that "[the police] never called me a liar. They kept asking me questions." (Tr.473)

Inconsistencies in testimony "do not render the testimony legally insufficient." *Commonwealth v. Crowe,* 21 Mass. App. Ct. 456, 477 (1986) *see also Commonwealth v. McGahee,* 393 Mass. 743, 750 (1985). "[A]ll of her statements are entitled to be considered as probative evidence [citations omitted]. Credibility is a question for the jury to decide; they may accept or reject, in whole or in part, the testimony presented to them [citations omitted]." *Crowe, supra* at 477.

Further, the defendant's motion ignores the "overwhelmingly strong" trial evidence, the motive behind Pape's perjurious statements, and her plea transcript, where she admitted she

committed perjury when she testified she was in the bathroom with the defendant. (B/1; G/1)

The defendant's motion also fails to mention that Pape was appointed an attorney, Terrence O'Connell, after she was charged with perjury. (L/1) O'Connell arranged a recorded interview with State Police on December 28, 2005. (K/ 1)[5] O'Connell was present at the interview, and Trooper White indicated that O'Connel set the meeting up and there were "no promises, no rewards, no inducements," and Pape was there on her own free will. (K/1-2) Pape, at this time, provided a statement to police that she saw the defendant shoot Jason Wells. (K/1) She was pacing up and down the hallway, going in and out of the bathroom, nervous because the defendant had a gun that he retrieved from the second floor of the house. (K/29-30) The defendant took the gun and placed it right to Wells' head. (K/31) Rebecca heard a "chh chh chh" noise from the gun, and understood this to mean that the gun was loaded. (K/33) The defendant was right in front of Wells. (K/36) Wells said that he could not get the items back. (K/36) The defendant said, "fuck it, get my shit back," and shot Wells. (K/36-38) The defendant told Pape to "shut her mouth." (K/40-44) The

[5] The Commonwealth has submitted the full audio of Pape's interview with her attorney and the troopers, rather than a transcript, as the emotion and inflection of Pape's statements are relevant to this claim as to which statement she made is true. (Ex.K)

defendant said for her to say that he was in the bathroom with her. (K/45)

Pape initially told police that the defendant was in the bathroom during the shooting. She consistently told law enforcement this story, that the defendant was in the bathroom with her, throughout the entire grand jury.

The defendant asserts that two days before her Grand Jury testimony, the prosecutor called Pape a "liar" and accused her of trying to protect the defendant. (Def. Ex.1 at 32-33) The prosecutor allegedly also told Pape that she would be going to jail for perjury and he would make sure she did "jail time." (Def. Ex. 1 at 32-33). The defendant has included an affidavit from Brian Illife indicating that Pape felt that she was being forced to commit perjury. (Def.Ex. 1 at 33; aff'd of Illife).

Pape testified that the defendant was in the bathroom with her at the Grand Jury testimony. (Ex. 2 16-18, 27) On the same date of her grand jury testimony, she was indicted for perjury. (L/1) She testified at trial that the defendant was not in the bathroom with her at the time of the shooting. She further testified that the defendant shot Jason Wells. She then subsequently pled guilty to the charges of perjury, and admitted she perjured herself at the Grand Jury with the statement that the defendant was in the bathroom. (I/1; L/1)

The defendant cannot succeed on his claim that Pape was lying when she said that the defendant shot Wells and telling the truth when she said he was in the bathroom with her during the shooting. First, as evidenced at trial, Prunty and Pape discussed where they were during the shooting in recorded jailhouse telephone calls. (D/1) The Superior Court noted, "[t]he jury heard a recorded conversation between the defendant and Pape in which they discussed what each had told the police about the shooting. When their statements concerning their exact location at the time of the shooting did not align, Pape said, "[S]ee, now the story is all fucked up," indicating that their "story" had been contrived. The overwhelming weight of the evidence implicated the defendant in the shooting."

Pape indicated that she was scared for her life. She was scared because he shot Wells, her friend. She was also scared that if he was to get out of jail, he would kill her too.

The defendant makes much of Pape's credibility, her testimony on cross-examination, and her conflicting statements. The Supreme Judicial Court addressed her cross-examination testimony when it stated, "[i]ndeed, the extensive cross-examination of Pape revealed a litany of prior inconsistent statements she had made on a number of matters, all of which undermined her credibility and allowed the jury to disbelieve her trial testimony." (B/4-8) Her credibility is a matter left

for the jury, this issue was addressed by the Supreme Judicial Court, and the defendant cannot succeed on this claim.

VI. THE COMMONWEALTH DID NOT PROVIDE THE WITNESSES WITH ANY PROMISES, INDUCEMENTS, AND REWARDS, AND THE DEFENDANT CANNOT ESTABLISH MISCONDUCT.

The defendant states that the Commonwealth did not disclose promises, inducements, or rewards. This claim, as indicated in Issue II, supra, is not a 25(b)(2) claim, it is a Rule 30 claim. It relies on material outside the trial record- grand jury testimony, affidavits, and interviews. The Commonwealth has reiterated the same argument below that it set forward in its Rule 30 opposition.

The defendant makes numerous claims with respect to alleged misconduct with regards to the disclosure of "implicit and "explicit" deals involving witnesses Salamone, Ford, Pape, and Rose. A judge may grant a motion for a new trial only if it appears that justice may not have been done. *Commonwealth v. Walker,* 443 Mass. 867, 871 (2005). If a motion judge, as here, was the trial judge, the judge may factor into his consideration what the judge learned about the case and the witnesses/affiants at trial. *Commonwealth v. Ortiz,* 393 Mass. 523, 536-37 (1984); *Commonwealth v. Hammond,* 50 Mass. App. 171, 177 (2000). Here, an affidavit provided by the defendant, and also an affidavit containing double-hearsay by a non-witness, does not rise to the level of establishing that justice was not done.

Moreover, as repeated throughout this appeal, the defendants supplemental information is outside of the trial record and not appropriate to be considered for a Rule 25(b)(2) motion.

The defendant's bold-faced assertion, that the Commonwealth did not disclose promises, inducements, and rewards is in complete contradiction with the trial transcript.

"There is no disagreement that the Commonwealth has an obligation to disclose the terms of any agreement, promise, or inducement proffered to a testifying witness before trial, and that a failure to do so may violate the defendant's right to due process." *Commonwealth v. Rebello*, 450 Mass. 118, 122 (2007} (citing *Commonwealth v. Birks*, 435 Mass. 782, 787 (2002) "'Understandings, agreements, promises, or any similar arrangements between the government and a significant' government witness [are] exculpatory evidence that must be disclosed." *Commonwealth v. Burgos*, 462 Mass 53, 62 (2012) (*quoting Commonwealth v. Hill*, 432 Mass. 704, 715-716 (2000)). Even where no agreement or promise between the government and a witness has been reached, the discussion should be disclosed to the defendant and placed before the jury as "what benefit the witness subjectively hopes or expects he might receive when it comes time to dispose of his own case," is "obviously relevant to the questions of bias and motivation." *Birks*, 435 Mass. at 787. "When the 'reliability of a given witness may well be

determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States,* 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959}).

Further, the Supreme Judicial Court has stated that the exact terms of an agreement do not need to be clearly delineated but that "any communication that suggests preferential treatment to a key government witness in return for that witness's testimony is a matter that must be disclosed by the Commonwealth." *Hill, supra* at 716.

Notably, the defendant's motion does not contain an affidavit from the witnesses' attorneys indicating that there were promises, inducements, or rewards for their clients. *See Commonwealth v. Rebello*, 450 Mass. 118 (2007)(motion for a new trial alleging failure to disclose agreement is supported by statements from the witness's attorney); see also *Commonwealth v. Hill,* 432 Mass. 704 (2000). The defendant's motion is devoid of any evidentiary support from trial counsel or the attorney for the witness.

A review of the transcript indicates that there were no undisclosed deals. The defense attorney filed a motion to disclose all promises, inducements, and rewards on November 24, 2005, which was allowed. (A/3-4) The Court discussed the issue of promises/rewards with counsel at the final pretrial

conference date, at which the Commonwealth represented that there were no undisclosed deals, and defense counsel concurred with that representation.

The cases upon which the defendant relies on are factually distinguishable from the case at bar. The defendant relies on *Commonwealth v. Hill*, where a new trial was granted where the Commonwealth failed to disclose an agreement with the key prosecution witness, and permitted the witness to mislead the jury about sentencing expectations and his motive for testifying. *Hill,* 432 Mass. 704, 711-714 (2000). Here, all of the four witnesses with open cases testified about their cases and lack of promises/inducements/rewards. Moreover, the witnesses testified in regards to their expectations as to whether their testimony would benefit their open cases.

1. Rebecca Pape

Rebecca Pape was not granted any promises, inducements, or rewards in relation to her testimony at trial. The judge asked the prosecutor if a Ciampa instruction was necessary, and the prosecutor replied no, and indicated that there were no promises, inducements, or rewards. (Tr.455) Defense counsel also indicated that he was aware that there was no promise or inducement for Pape's testimony. (Tr.455)

Pape did state to Confessor Llamos, her boyfriend, that she "wonder[ed] if she could get her cases dropped." (Tr.458) She

indicated that at the time of the trial, her perjury and credit card fraud cases were still open. (Tr.516) She stated that the believed that her attorney, Terrence O'Connell, met with the police and prosecutor to discuss her perjury charge, not to garner her any favor in regards to her testimony and open perjury case. (Tr.505) Pape plead guilty to the charge of perjury, and she received sixteen months in the house of correction, time served deemed served.

2. Thomas Salamone

Salamone was not granted any promises, inducements, or rewards in relation to his testimony at trial. Salamone testified that he was awaiting trial. (Tr.588) He was held at the Barnstable County House of Correction when the defendant told him details of the Wells homicide. (Tr.840-853) Salamone explained to the jury that he was not testifying to receive a benefit with his plea agreement. (Tr.863) He stated that he had a "heavy conscience," and contacted the government due to the weight of what the defendant had told him about the murder. (Tr.863-864)

3. Christopher Rose

The Commonwealth did not make any promises, inducements, or rewards in relation to Rose's testimony. Rose was in the Barnstable House of Correction at the time of trial. (Tr.588) He stated at trial, in the beginning of his testimony, that no

one has promised him anything in exchange for his testimony. (Tr.588) He explained to the jury that he was indicted for perjury, due to his statements before the grand jury on the immediate case. (Tr.640) He further stated that he provided a statement to law enforcement stating what happened at Palomino Way and made this statement without promises from the government. (Tr.652) Rose admitted to his previous convictions. (Tr.686-695) Rose plead guilty ot the charge of perjury, and he received one year in the house of correction, time served deemed served.

4. Richard Ford

There were no undisclosed deals, "implicit" or "explicit," for Ford. The trial transcript indicates that Ford testified and was forthright of his previous convictions. (Tr.581-583). Ford also stated that he did not received any consideration for his testimony before the grand jury. (Tr.575) He also stated that he did not have warrants at the time of the homicide. (Tr.575) He stated that he was not told by the District Attorney's Office that the warrants would be addressed should he testify. (Tr.575) Ford, in the testimony listed above, was forthright about any expected or received "benefit" from his testimony at trial or in the grand jury.

As the Commonwealth was forthright in representing that there were no promises, inducements, or rewards for the above-

mentioned witnesses, the defendant cannot succeed on his claim of non-disclosure. This issue was addressed at the final pretrial conference and the relevant factual issues and witness expectations were fleshed out before the jury. The defendant cannot succeed on this claim, and his motion must be denied.

CONCLUSION

The Commonwealth respectfully requests this Honorable Court deny the relief requested and affirm the defendant's conviction.

Respectfully submitted,
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July 19, 2017

CERTIFICATE OF SERVICE

I, Elizabeth A. Sweeney, certify that I have on this day delivered in-hand, a copy of the Commonwealth's Memorandum in Opposition to Defendant's Mass. Rule 25(B)(2) motion to the Clerk of the Barnstable Superior Court, Barnstable, MA, and I have this day emailed a copy of the memorandum to defendant's counsel, and will serve in-hand a hard copy on the hearing date:

Patricia Quintillian, Esq.
PO Box 943
Williamsburg, MA 01096

On July 19, 2017

Elizabeth A. Sweeney
Assistant District Attorney